In the Supreme Court of Pennsylvania.

THE COMMONWEALTH *vs.* JOHNSTON.

1. Special pleading before a Justice of the Peace, though not to be encouraged, is not unlawful, and when a defendant has pleaded specially, and the plaintiff demurs to his plea, the facts therein alleged are regularly on the record, and become substantive ground of the judgment.
2. In a conviction under the Act of 22d April, 1794, for performing worldly employment on Sunday, it should appear what the work was for which the defendant was convicted, but as the whole record is to be taken together, it is sufficient if the description of the work appear in any part of it.
3. Driving an omnibus as a public conveyance daily and every day is worldly employment, and not a work of charity or necessity within the meaning of the Act of '94, and therefore not lawful on Sunday.
4. A contract of hiring by the month does not, in general, bind the hireling to work on Sundays, and if his word be such as the Statute forbids, an express agreement to perform it on Sunday will not protect him, for such a contract is void.
5. Though travelling does not in a legal sense fall within the description of worldly employment intended to be prohibited, yet the running of public conveyances on Sunday is forbidden by the Statute. BLACK, CH. J. and LEWIS, J. dissenting.[1]

The following dissenting opinion was delivered by

BLACK, Ch. J.—The defendant, Johnson, was convicted, before an alderman, of violating the Lord's day, commonly called Sunday, in "driving certain horses, to which was attached an omnibus, in which certain persons were carried over the streets of the city of Pittsburg, and from the said city over and along certain roads within the county of Allegheny."

It is important that the laws which relate to this offence should be properly administered. A general suspension of ordinary employment at regularly recurring periods, is universally admitted to have good effects on the physical, moral and pecuniary condition of the people. It is for these worldly reasons alone that the law of 1794 was made. No sane man can read the constitution and believe that

[1] Vide ante, p. 285, for opinion of the court.

the government has a right to enforce the observance of this or any other religious duty as such.

The statute is capable of being perverted by a loose construction to purposes for which it was never intended. Being the only point of possible contact between the Church and the State, it is natural enough that some who have not fully learned the important principle of toleration, should desire to make it rub hard. Besides, it happens unfortunately that this is the very subject on which the opinions of the several sects are at the greatest variance. Some believe that the denunciations of the Old Testament against the violation of Saturday, are in full force against those who do not rest on Sunday, and that a Christian is bound to keep the latter just as a Jew did the former. Others adopt this opinion only in part; they call the first day of the week by the Jewish name for the seventh, but think that the spirit of Christianity has much mitigated the severity of the old law. A third class treat it as a weekly festival the church, at which the resurrection of its Founder is to be solemnly celebrated, but repudiate utterly the notion that it has any connection with, or analogy to, the Mosaic Sabbath. This latter party is subdivided between those who hold, that the transcendently great event which the day commemorates should be honored by cessation from labor, as well as by acts of special worship, and others who maintain that their duties are fulfilled by the appropriate religious ceremonials alone. There are many persons, again, who are clear that one day is not more holy than another, who profess to have traced the origin of the contrary custom to the decree of a Roman Emperor in the third century, and who stoutly oppose themselves to all those doctrines and commandments of men, by which the original purity of the divine revelation has, in their opinion, been corrupted. Besides all these, there is another numerous and respectable Christian sect, whose exemplary moral behavior and devoted piety give their feelings a fair claim to be considered. Their doctrine is, that the fourth commandment in the decalogue was never changed nor repealed. They teach (and as far as they are permitted, they practise what they teach) that Sunday is one of the six days on which they are commanded to labor and do all their

work. To them the seventh day is the Sabbath of the Lord their God. The universal privilege of private judgment enjoyed in this country has not only created an endless variety of opinions among Christians, but we have with us and of us still others (the Jews for instance) whose faith on this subject is neither derived from, nor in accordance with, that which is taught in the New Testament.

We are not to decide between these conflicting doctrines. The law protects them all, but adopts none as a favorite. It regards the sincere professors of every faith with equal eye, and leaves even the sin of hypocrisy to be punished by Him who alone knows the secrets of the heart. The government has no more authority on this question of observing the first day of the week than it has on the other disputes of polemic theology. It may as well attempt to make men unanimous on the duties of prayer, devout meditation, baptism or the eucharist, as on this. It is no doubt very desirable that we should all be of one mind on subjects which interest us so deeply. But how shall such a consummation be effected? The experiment of legal force has been fully tried, and is a flat failure. The world has been governed with very little wisdom. Its political history, until we come to that of our own country, is almost an unbroken record of errors and of wrongs. But of all blunders, the most preposterous is the effort to advance religious truth by State favor; and of all tyranny, the most brutal, blind and revolting is that which punishes a man for the sincere convictions of his heart. Rulers have doubtless been impelled to do it very often by the best motives. "*Malo regnum vastatum quam damnatum,*" said Philip V., when told that his persecutions would make the Low Countries a waste; and the English government may have only desired the salvation of the Irish, when it hanged and slaughtered them by thousands, and confiscated their property, for honestly adhering to an outlawed faith. Such benevolence produces precisely the same effect as the most malignant hatred. I admit that there is a great difference between burning a man to death at a slow fire, and compelling him to pay a fine, so small that a laborer, by diligence and self denial, can make it up in a month. But the difference is only in *degree*. It was to extirpate the *principle* of intolerance that our

Constitutions provided that "No human authority can in any case whatever control or interfere with the rights of conscience, and no preference shall be given by law to any religious establishment or mode of worship."

Those among us who believe that the institution of the Jewish Sabbath has been engrafted on the Christian system, and changed from the seventh to the first day of the week, have a right to propagate their doctrine. But they must do it by moral means—by appeals to reason and conscience—by their own example of an upright walk and conversation in life—and by charity to those who differ from them. They must get their arguments from revelation (if they can) not from the statute book. Religious truth asks no favor except that of its natural freedom. The absurdity of planting an oak in a hot-house is not more palpable than that of sheltering Christianity under legal enactments. It needs no forcing glass. It demands the stimulus of no artificial heat. By the power of its truth it will conquer the world: but it rejects the unworthy aid which the arm of flesh is so prone to offer. *Non tali auxilio, nec defensoribus istis.*

If the act of 1794 be not construed according to the spirit of that religious liberty which the constitution guaranties, the construction must inevitably be wrong, and will lead to the worst consequences. We need not fear a union of Church and State; of that there is no danger. But the best interests of the country depend much on the reverence of the people for the religion which is taught among them. Any thing which is calculated to bring Christianity into contempt is a deep public injury. And how can that be done more effectually than by clothing it in the coarse rags of human legislation, patched up and forced on by judicial decisions? Any advantage given by law to one sect over others, is an irreparable injury to the party so favored. It will naturally be construed into an admission that it has no vital truth to sustain it. We live among a people who scorn all contrivances to fetter the mind. Statutes are necessary for some purposes, but nobody in this country believes them to be inspired. Justices of the peace and aldermen, judges, sheriffs, and constables are useful in their way, but they are not called and sent to preach any system of theology what-

ever. Convictions and executions, fines and imprisonment, will never be accepted as arguments, by any American, who has sense enough to know his right hand from his left. It is far better, even for the denomination we may desire to help, that every man should be fully persuaded in his own mind, and then suffered to act according to his honest convictions. Of course, if his opinions prompt him to do what is injurious to his neighbor, the law should stop him. But I hold, that the essence of republican liberty consists in this: that every citizen may do as he pleases, in regard to all those things which concern nobody but himself. And with due deference to the majority, who seem to think otherwise, I submit, that if I choose to go to church, or even to a heterodox meeting, in a three cent omnibus instead of a carriage hired for three dollars, or bought for a thousand, it is nobody's business but mine, and neither I nor the man who drives me ought to be punished for it.

These are general principles, which up to the present time, have never been violated by this Court. I am willing to go now as far as our predecessors have ever gone. But the affirmance of this judgment takes a wide leap beyond that mark. It clears the bounds of natural justice, and leaves all precedent out of sight behind it. It fines a man for carrying decent and good citizens to religious meetings, and to other proper places, where, heretofore, it has been thought they had a right to go. It denounces as criminals, punishable by law, those men and women who go to church or visit the graves of their friends, or take the air on Sunday, and whose poverty compels them to go by the cheapest mode of conveyance. It is true that those who rode in the omnibus are not convicted; but no sophistry can make a distinction between the sin of the agent and that of the persons who employ him and participate in his acts.

Let us look more particularly into the case before us.

There were pleas, replications and demurrers filed. All this was something worse than useless. The alderman could not enroll them. A party accused may have his ground of defence stated on the record, as was done in *Specht* vs. *The Commonwealth*, 8 Barr. But the decision of a magistrate on sharp points of special pleading would be a very unsafe reliance in the execution of the law.

The evidence is also returned. Neither have we any legal right to notice *it*. A bill of exceptions is the only means by which evidence can be made part of the record so as to bring it before a Court of Error; and a bill of exceptions before an Alderman is as novel as a demurrer.

This case, therefore, like all others of the kind, must stand or fall by the naked record of conviction.

In these summary proceedings the magistrate acts both as judge and jury. To allow them at all is a violation of the great fundamental principle of jurisprudence, secured in England by Magna Charta, and here by the Constitution, which requires that every man shall be tried by his peers. Therefore, all intendments are against such a record. Whatever does not appear on it is taken not to exist. When it leaves room for a presumption, that presumption is always in favor of innocence. The statute must be strictly pursued by the justice: "otherwise," says Burn, "the common law will break in upon him, and level all his proceedings."

The act of 1794 furnishes a form of conviction under it. If that form be followed, perhaps a particular description of the work or labor done may be omitted. This is not a case which involves that point. But when the justice does undertake to describe the act committed by the accused party, and that description shows him to be innocent, I had hoped that no court in Pennsylvania would sustain the conviction. Suppose, for instance, a man were convicted of breaking the Sabbath by preaching the gospel, or burying the dead, or nursing the sick, it ought clearly to be reversed, because it is manifest from the whole record taken together, that the magistrate's conclusion of guilt was erroneous. So, also, where the offence is set out so equivocally that it cannot be known whether the act was innocent or guilty; thus no plausible argument could be made in favor of a conviction for rapidly moving one's hands up and down on Sunday, without saying whether the defendant was pitching hay or gesticulating in the delivery of a sermon. A person may violate the Sabbath by walking from one place to another, if he were walking for a wager; but he may also walk without being guilty of any offence. A record which charges him with no more than walking, charges him with nothing.

In the case before us the alderman has very properly incorporated into his record of conviction the act which the defendant had done, so that we might review it. He gives his own judgment that the defendant is guilty, but he offers us the premises and leaves us to draw *our* conclusions, and say whether his was right or wrong. Let us see what it is. The defendant is accused and convicted of driving certain horses attached to an omnibus in which certain persons were carried. This is the whole head and front of his offending. Whether this was a crime or not depends on other circumstances not stated. If he was carrying the passengers to a bull-bait or a horse race, it was a scandalous violation of law and morals; but if he was taking them to a camp-meeting, or a funeral, or to some other proper place, he did no wrong, and to punish him would be an outrage on common justice. What are we to infer from a record like this? Not guilt; for the presumption of law is in favor of innocence, and the record does not contradict it. The alderman having stated the facts, we must accept them as being truly stated according to the evidence. Here, then, is a man sentenced for a criminal offence, without accusation and without proof, that either he or the persons with him, did, or intended doing, anything in the smallest degree unlawful.

Under the circumstances here disclosed, it is not only the legal, but the natural presumption, that those persons were about no guilty act, nor bent on any evil purpose. The inhabitants of Pittsburg and its environs are as moral and religious a people as any other on the globe, of equal numbers and living within similar limits. A fair man of sound judgment, (to say nothing of Christian charity,) who would see a score of unknown persons passing in or out of the city on Sunday, would take it for granted, without any aid from the rules of law, that they were not going to perpetrate any crime.

It will not do to say that this presumption of innocence is repelled by the alderman's judgment pronouncing the act an unnecessary worldly employment. This is only his judicial conclusion from the evidence. We, having before us the same materials for a judgment, are not forbidden to differ from him. If it be true that the judgment of conviction is conclusive, though against the palpa-

ble truth of the case as set out on the record, then a justice of the peace may convict a man of anything which, in his ignorance or bigotry, he may choose to call sabbath-breaking, no matter how innocent it may be in the eye of the law. Opinions on this subject are very various among the eight or ten thousand inferior magistrates of the State. One justice would convict without hesitation for an act which others would pronounce entirely harmless. Besides, this law presents questions of real difficulty, about which the most learned lawyers have differed many a time, and will again. The citizen has no security except in having the law applied to the facts of his case by a tribunal competent to do it. But this, it seems, we must avoid for the future. Even when an alderman or justice of the peace doubts whether it is right or wrong to go to a place of public worship in an omnibus, but inclines to the latter opinion, and yet fearing that he may do injustice, puts the whole case fully and truly on the record for the purpose of having it reviewed, we can do nothing but astonish him and all who know him, by declaring his opinion infallible. If this be the true view of the subject, why should a party be mocked with a writ of error?

I think no lawyer will say, when the facts on which a summary conviction is based are set forth on the record, that they ought to be taken more strongly against the defendant than a special verdict would be in a common law indictment. And when was a special verdict like this ever sustained? Or what court of error ever listened to an argument on the proposition that the judgment of the inferior tribunal was conclusive of the defendant's guilt when the facts, found and placed on record, proved him to be innocent?

I am of opinion that this conviction ought to be quashed, because it is on its face a conviction for nothing worse than decently passing along a public road on the first day of the week, a privilege which is and ought to be enjoyed by every man, woman and child in the commonwealth. The presumption is, that the defendant and the persons with him were going about their proper moral and religious duties. I do not believe that it is worse to ride in an omnibus than in any other vehicle, nor that a man who holds the reins and guides the horses is more wicked than they who profit by his skill. I think

a coachman who takes his employer's family to church is not within the act of 1794, and I can make no distinction between that case and this.

But this case being one of a long series, and having been argued with reference to the evidence taken by the alderman, I will assume that it is all before us. A very slight examination of it will show that the record is precisely correct in the statement it furnishes of the defendant's acts. He is not charged with carrying persons over streets and roads for any improper purpose, simply because the proof was otherwise. The alderman has in this respect done his duty like an upright magistrate, and given the result of the evidence truly, without "extenuating anything or setting down aught in malice."

It appears that the defendant is an employee of a line of omnibuses which runs between Pittsburgh and Lawrenceville, a town three miles distant, where the public cemetery is situated. If anything can be proved by human testimony, it is established that these omnibuses are used on the first day of the week for purposes which are not only innocent, but meritorious and praiseworthy. The inhabitants of Lawrenceville prefer a residence there for reasons of taste, economy or health. But being a mere suburb of Pittsburg, their business during the week, and their religious duties on Sunday, require most of them to be in the city. The convenience of an omnibus line to carry them and their families to church was a motive which is proved to have influenced at least some of them, in the selection of that place. Without this mode of conveyance, there are great numbers who would be wholly deprived of all ecclesiastical communion with the people of their own faith; for they have no churches or meeting-houses nearer home than Pittsburgh, they are not able to keep carriages, and the roads are generally in a condition which makes travelling on foot difficult for anybody, and impossible for women, children and persons of infirm health. The use of the omnibuses by these persons and by others who go to visit the graves of their friends, and by some who leave the smoke of the city to breathe for a brief space a purer atmosphere in the woods and fields, constitutes the full sum of the immoralities com-

plained of. This is proved by the testimony of a dozen most unimpeachable witnesses, all of whom are called by the informer himself.

The whole business is conducted with the utmost propriety. One person only testifies that on a single occasion, long ago, he had heard swearing in an omnibus. The proof is full that all disorderly persons were turned and kept out. It is certainly not improbable that among the many persons who use this conveyance for such purposes as I have mentioned, an occasional sinner in disguise may have been admitted, and used it for travelling on worldly or unlawful, and, for aught I can say, criminal business. But, surely it is better that a wicked man should be left to the punishment which will in time overtake him, than that the innocent should suffer for his offence. The agent of the line swears that the vehicles are run on Sundays with special reference to the hours at which the religious congregations assemble and dismiss, and not either as often or at the same times as on other days.

Notwithstanding the necessity thus existing for a line of cheap conveyances to carry the people back and forth between Lawrenceville and Pittsburg, all the drivers were prosecuted, as if they had been detected in the perpetration of some great enormity. When the prosecutions failed with one alderman, they were renewed before another. What motive prompted the effort to deprive the people of Lawrenceville of the means which had been previously at their command, of worshipping God in the way their consciences told them was right, I do not pretend to judge. But whether it be done by infidels to injure the Christian congregations generally, or by bigots of one church to break down another, it is equally a perversion of the law and of the gospel. If any portion of our people hold the privilege of going to church in an omnibus, when that is their only means of getting there, at the mercy of every profane scoffer or blinded sectary who chooses to make an information, then freedom of conscience is in a worse condition than I thought it was.

It may be answered, that though it was proper enough for the passengers to go to church or to the cemetery, or into the country for health and recreation, the defendant himself was engaged in his

ordinary calling, and therefore is guilty. This mode of putting the case is very superficial, to say the least of it. When it is proper for one man to do an act which he cannot accomplish without assistance, another may aid him. A person charged with doing worldly employment on Sunday, may plead his neighbor's need for it as well as his own. The fact, that he does it for hire, makes no difference. A calling, profession or trade may be exercised on the first day of the week for money, if the public welfare or private necessity demands it. Thus the apothecary sells drugs on that day, the physician attends the sick, the undertaker buries the dead, the sexton opens the church—all in pursuit of the business by which they earn their bread—and they justify their conduct, because it is necessary, not to themselves, but to their customers.

If, therefore, it be lawful for men to go and come to church and elsewhere on the first day of the week, he who bears them over the mud or snow is as innocent as they are. In ministering to their necessities he brings himself within the exception of the statute, as clearly as if his own safety or convenience depended on it. The half dime which his customers pay him for carrying them to the church, is no greater sin than the contribution expected from them when they get there to the preacher's salary.

The very point was ruled by the Court in *Logan* vs. *Matthews*, 6 Barr, 417, that what a man may lawfully do by himself, he can do by the assistance of another. The keeper of a livery stable, in the exercise of his ordinary business, hired a horse on Sunday to a person who used it to visit his father. The contract was declared to be lawful. And why? Because there was nothing in the law to hinder or forbid such a visit. Since no law hinders men from going to church or visiting a burying-ground, or taking the air, it is lawful, on the principle of the case referred to, for an omnibus driver to furnish them the means of doing so.

I give to the word *necessity* the broadest definition. Nothing is necessary which is not *indispensable*. But different things may be necessary as means to different ends; one thing is necessary to life, another to health, another to decency, another to comfort, another to intellectual improvement, another to moral culture,

another to spiritual progress; and all these ends being lawful, whatever is necessary to effect either of them, is a necessity within the meaning of the law. To the health, comfort and decency; to the moral, mental and religious improvement of these people, a cheap, rapid and ever ready mode of conveyance is an absolute necessity. To compel them to remain imprisoned within their houses on Sunday, is odious tyranny. To allow them to go out only on condition that they trudge through the mud and endure the rains, is absurd, as well as cruel. What would be thought of an order to close the bridges and tie up the boats, lest the people of Allegheny should commit the sin of going to church dry, instead of swimming across the river?

Numerous omnibuses, hacks and carriages, running through a populous city, may become a nuisance. When this is the case the local authorities may properly regulate them, or stop them altogether. But of this the people themselves are the best judges. The city authorities, representing the people, have not thought proper to do so in Pittsburg.

In *Jones* vs. *Hughes* (5 S. & R. 299), it was held that travelling was not within the act of 1794. The correctness of this decision has never been questioned. All the legislation of the Commonwealth has proceeded on the principle then established. The State government carries passengers over her own canals and railways every Sunday, and regularly provides by law the means of doing so, keeping for that purpose officers, agents and laborers in her constant employ. There is more walking and riding done on the first day of the week than any other. Persons who cannot go out at any other time, go then. The whole population is in motion. Not one in ten thousand thinks it his duty to keep within doors, and perhaps no man in the Commonwealth is so completely saturated with bigotry, that he would prevent the people from moving about from place to place, if he could. The worst that malice itself can allege against those who rode in an omnibus, No. 11, on the 1st of September, is, that they were going where they pleased in a decent and orderly manner, and for purposes of which the propriety and lawfulness

have not been questioned. What the driver did, was to furnish them with the necessary means of doing so. If the authority of *Logan* vs. *Matthews* is not to be overturned, and common sense upset along with it, the driver and passengers were alike innocent of every offence, except, perhaps, that of patronizing the wrong church.

In the District Court for the City and County of Philadelphia.

BECKER *vs.* LEVY.

1. The removal of the maker and indorser of a promissory note into another jurisdiction after the execution of the instrument, will dispense with the necessity of presentment and notice of non-payment.
2. It seems, that the indorsement of a note by one not a party to it, in the absence of evidence of any particular intention, authorizes the payee to write over his name any form of engagement he may see proper.

F. C. Brightly, for plaintiff.
J. A. Phillips, for defendant.

The opinion of the Court, in which the facts appear, was delivered by

SHARSWOOD, P. J.—The note sued on was drawn by one Tuteur to the order of the plaintiff, and was indorsed by the defendant, without any previous indorsement by the plaintiff. In *Kyner* vs. *Shower* (13 Penn. St. Rep. 444), it was held, that when a person who is neither maker, drawer, payee or acceptor, puts his name on commercial paper, in the absence of evidence of what was the particular intention of the parties, he authorizes the payee to write over his name any form of engagement he may see proper. And the authority of that case, to that point, is recognized in *Campbell* vs. *Knapp* (15 Penn. St. Rep. 30). Taking it, however, to be an indorsement, according to *Taylor* vs. *McCune* (11 Penn. St. Rep. 460), in which it was held that the blank indorsement of a note by